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DEL MAR SEAFOODS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEL MAR SEAFOODS, INC.	)	Case No.: CV 07-02952 WHA
)	
Plaintiff,	)	PLAINTIFF DEL MAR SEAFOODS,
	)	INC.'S TRIAL BRIEF ON THE
vs.	)	APPLICATION OF THE
	)	CALIFORNIA STATUTE OF
BARRY COHEN, CHRIS COHEN (aka	)	FRAUDS TO MARITIME
CHRISTENE COHEN), <i>in personam</i> and	)	CONTRACTS
F/V POINT LOMA, Official Number)	
515298, a 1968 steel-hulled, 126-gross ton,)	
70.8- foot long fishing vessel, her engines,)	
tackle, furniture, apparel, etc., <i>in rem</i> , and)	
Does 1-10,)	
)	
Defendants.	)	Date: May 20, 2008
	)	Time: 7:30AM
	)	Courtroom: 9, 19th Floor
And Related Counterclaims)	
	)	Honorable William H. Alsup

I. INTRODUCTION

Plaintiff DEL MAR SEAFOODS, INC. ("Del Mar") hereby submits this brief in support of its position that the California Statute of Frauds, California Civil Code §1624, does not apply to bar the oral modifications to the Promissory Note ("Note") and Preferred

DEL MAR SEAFOODS, INC.'S TRIAL BRIEF ON THE APPLICATION OF THE CALIFORNIA STATUTE OF FRAUDS TO MARITIME CONTRACTS

1 Ship Mortgage ("Mortgage") whereby defendant Barry Cohen agreed to assume the debts of
 2 his son's Michael and Leonard Cohen. Plaintiff expects Defendants to argue that the statute
 3 should prohibit those modifications. For the reasons set forth below, the California Statute of
 4 Frauds is inapplicable to those oral modifications. Even if the Statute of Frauds were found to
 5 apply, however, the oral modifications were sufficiently executed by the parties and should
 6 therefore be upheld.

7 **II. SUMMARY OF RELEVANT FACTS**

8 Del Mar expects the Cohen's to argue that an agreement to be responsible for the
 9 debts of his two sons is unenforceable under the California Statute of Frauds, Cal. Civ. Code
 10 §1624(a). Such an assertion is wrong as a matter of law.

11 **III. APPLICABLE LAW**

12 The Note and Mortgage at issue in this case are maritime contracts. *Norfolk Southern*
 13 *Ry. Co. v. James N. Kirby, Pty Ltd.* 542 U.S. 963. Defendant's have also stipulated that the
 14 Mortgage is a valid Preferred Ship Mortgage under 48 U.S.C. §31321. Therefore maritime
 15 law will apply. In the Ship Mortgage Act of 1920, subsequently re-titled "The Commercial
 16 Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. §31301 *et seq.* Congress
 17 expressed the importance of the uniform treatment of maritime law in general, and preferred
 18 ship mortgages in particular, by mandating that preferred ship mortgages be regulated
 19 exclusively under federal maritime law through the CIMLA. 46 U.S.C. §31325.

20 **III. LEGAL ARGUMENT**

21 **1. California Statute of Frauds**

22 The Statute of Frauds serves to "bar proof of certain agreements when there is **no**
 23 sufficient writing evidencing them." 1 Witkin, Summary of California Law (10th Edition
 24 2005), Contracts, Section 349, page 395.

25 **2. The California statute of Frauds is Not Applicable to Maritime Contracts**

26 In *Union Fish Company v. Erickson*, 248 U.S. 308 (1919), the Supreme Court held
 27 that that the California Statute of Frauds does not apply to maritime contracts. In *Union Fish*
 28

1 *Company*, a ship master entered into an oral contract with the ship owner to serve as the
 2 ship's master. *Id.* at 308. The Court found that the California Statute of Frauds was
 3 inapplicable to the contract because the contract was based on maritime employment and was
 4 maritime in nature. In finding the statute inapplicable and upholding the principle of
 5 uniformity in admiralty law¹, the Court held:

6 If one State may declare such contracts void for one reason, another may do
 7 likewise for another. Thus the local law of a State may deprive one of relief in
 8 a case brought in a court of admiralty of the United States upon a maritime
 9 contract, and the uniformity of rules governing such contracts may be
 destroyed by perhaps conflicting rules of the States.

10 *Id.* at 313. Because, the Note and Mortgage at issue in this case comprise a maritime contract,
 11 under the principle of uniformity the California Statute of Frauds cannot be allowed to
 12 invalidate the subsequent oral modifications by Barry Cohen to pay his son's debts.

13 Even if the Statute of Frauds were to apply to maritime contracts it would not apply to
 14 the contract at issue in this case. Here, there is an underlying written contract. Defendant
 15 Barry Cohen orally modified that existing contract when he said to Joe Roggio that he
 16 (Barry) would "be responsible for" paying Michael Cohen's debts and Leonard Cohen's
 17 debts.

18 In the alternative, even if California's statute of frauds were applicable to modify the
 19 contract it would not apply under the facts of this case. California Civil Code §1698
 20 specifically provides that a "contract in writing may be modified by an oral agreement to the
 21 extent that the oral agreement is executed by the parties." Whether a written contract has
 22 been modified by an executed oral agreement is a question of fact. *Eluschuk v. Chemical*
 23 *Engineers Termite Control, Inc.* (1966) 246 Cal App 2d 463. The obligation incurred by Mr.
 24 Cohen to pay Michael and Leonard's debts was memorialized in a spreadsheet that was

25 _____
 26 ¹ In *The Lottawanna*, 88 U.S. 558, 575 (1875) the Court noted that "it certainly could not have been the intention to
 27 place the rules and limits of maritime law under the disposal and regulation of the several States." In the more recent
 28 case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), where applicable state legislation conflicted with the
 maritime law on point the Court declared the state legislation to be inapplicable because it led to "material prejudice
 to the characteristic features of the general maritime law (and) interfere(d) with the proper harmony and uniformity of
 that law in its international and interstate relations." (244 U.S. 216.)

presented to him between November 10th and November 15th, 2005. (Trial Exhibit 37) That spreadsheet specifically depicts the amounts Barry Cohen owed to Del Mar Seafoods, Inc., and shows the portions of Michael and Leonard Cohen's debt as a part of the Mr. Cohen's debt to Del Mar under the Note and Mortgage. Following receipt of that spreadsheet, Mr. Cohen made payments to Del Mar on the outstanding balance on January 30, February 15, and again on April 23, 2007. (Trial Exhibits 34, 35, & 36 respectively). Mr. Cohen's further payments on his balance under the Note and the Mortgage, following his acknowledgement and acceptance from Joe Roggio of the spreadsheet detailing the source of that debt served to execute Cohen's agreement to pay his son's debts.

3. CONCLUSION

Applying the State's Statutes of Frauds to the facts of this case would contravene the well accepted principles establishing the uniformity of maritime law. Additionally, Cohen's promise to pay his son's debt are valid under Cal. C.C. §1698. Cal.. C.C. §1624 should not be applied to invalidate Barry Cohen's assumption of Michael and Leonard Cohens' debts and their addition to his balance under the Note and Mortgage.

Dated: May 21, 2008

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